UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

KENNEL TACKETT, ET AL.	)	
	)	
Plaintiffs,	)	Case No. 1:01CV00154
	)	
v.	)	**OPINION AND ORDER**
	)	
JUDY GAY RATLIFF, ET AL.	)	By: James P. Jones
	)	United States District Judge
Defendants.	)	

Julia L. McAfee and Carl E. McAfee, McAfee Law Firm, P.C., Norton, Virginia, for Plaintiffs; Michael L. Dennis, Dudley, Galumbeck, Necessary & Dennis, Tazewell, Virginia, for Defendants Judy Gay Ratliff, Wayne Ratliff, Brian Ratliff, Barry Ratliff, and Michael Ratliff; John M. Lamie and Scot S. Farthing, Browning, Lamie, & Gifford, P.C., Abingdon, Virginia, for Defendant Delores B. Crouse Real Estate, Inc.

In this action by the buyers for rescission of a real estate conveyance, I grant summary judgment in favor of the defendant real estate agent, but will allow the action to proceed as to the sellers on the ground of mutual mistake.[1]

[1] The plaintiffs recently added James D. Ribble, Jr. and Alpha Land Surveyors, P.C., as defendants. These defendants are not affected by any rulings in this opinion.

I

The facts of this case center around a purchase of real estate from the defendants Judy Gay Ratliff and her sons, Wayne Ratliff, Brian Ratliff, Barry Ratliff, and Michael Ratliff (the "Sellers") by the plaintiffs, Kennel and Joann Tackett (the "Buyers"). In the Buyers' First Amended Complaint, they assert claims of fraudulent representation and mutual mistake of fact against both the Sellers and Delores B. Crouse Real Estate (the "Realtor"), the real estate agency that represented the Sellers.[2] In regard to the fraudulent representation claim, the Buyers specifically allege that the boundary of the property was in dispute between the Sellers and their neighbor, Pharoh Roberts, that the Sellers and the Realtor knew about the dispute, and that these defendants failed to inform the Buyers of this dispute. (*See* First Am. Comp. ¶ 18.) The Buyers assert that this concealment was made with the intent of causing them to purchase the property and constituted an actionable misrepresentation. (*See id.* at ¶ 19, 20.)

[2] The Buyers are citizens of North Carolina and all of the defendants are citizens of Virginia. Accordingly, jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2002). A federal court exercising diversity jurisdiction must apply the law of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). The parties agree that Virginia substantive law applies.

In addition, the Buyers allege that there was a mutual mistake of fact between the parties regarding the number of acres contained in the property and that this mistake had a material effect on the use and value of the property. (*See id.* at ¶ 23.)[3] The Buyers assert that the Sellers and the Realtor "contributed to or induced" the mutual mistake and that but for the mutual mistake, the Buyers would not have purchased the property. (*See id.* at ¶ 24, 25.) The Buyers do not seek damages for the difference in the property as represented and as it exists; they seek only rescission of the transaction, together with their expenses incurred in connection with the purchase.

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[3] While the First Amended Complaint asserts that the mutual mistake was as to the number of acres contained in the property, the record and oral argument before the court indicate that a central issue is the ownership of the driveway on the property, a question which in turn depends on the location of the northern boundary of the property. As one of the Sellers, Mr. Tackett, stated in his deposition:

> MR. FARTHING: My question to you, I believe, was you had alleged a mutual mistake between you and Crouse Real Estate, what was that mutual mistake?
>
> THE WITNESS: Like I say, she told me that, you know, that we was getting all the driveway; then, you know, we didn't . . . We didn't end up with it.

(K. Tackett Dep. at 66.) Although the First Amended Complaint does not raise this specific issue, the federal rules provide that the pleadings may be deemed amended to conform to the evidence. *See* Fed. R. Civ. P. 15(b). The defendants have been made aware of the actual contention of the plaintiffs through the extensive discovery in this case. Accordingly, there is no prejudice to any party in considering the issue of whether there was a mutual mistake as to the ownership of the driveway.

The parties have all filed motions for summary judgment. *See* Fed. R. Civ. P. 56. The motions have been briefed and argued and are now ripe for decision.

Based on the summary judgment record, the essential facts of the case are as follows.

The Sellers owned a parcel of real estate located on Grapefield Road in Tazewell County, Virginia. The property is bordered on the north side by Old Route 614, a disused state road that is used as a driveway to access the property. On the west side, the property is bordered by State Route 614, a road that was constructed to replace Old Route 614.

When the Sellers decided to sell their property, they contacted the Realtor and provided them with their deed to the property. The Realtor listed the property as containing approximately thirty-five acres.

When the Buyers learned that the property was for sale, they contacted the Realtor to inquire about purchasing it. Robyn Muncy, an employee of the Realtor, subsequently showed the property to the Buyers. The Sellers were not present at that time and in fact, the Buyers did not meet the Sellers until the closing date. Muncy is the only person who made any oral representations to the Buyers as to the boundaries of the property and what she said is in dispute. Regardless of what Muncy told the Buyers, they decided to have the property surveyed. However, before the survey was

prepared, the Buyers entered into a Contract of Purchase with the Sellers, agreeing to pay $70,000 for the property. The contract described the property as containing "35 +/- acres" and a contingency was added to the contract that stated "buyer will have property surveyed and it must contain at least 35 acres."

The Buyers then contacted James D. Ribble, Jr., a surveyor who was recommended by Muncy. Ribble obtained a copy of the deed to the Sellers, which stated that the Sellers owned the property south of Old Route 614. However, instead of using Old Route 614 as the reference point for the survey, Ribble used State Route 614. Accordingly, Ribble's original survey ("Survey 1") inaccurately described the northern boundary of the property as State Route 614 and inaccurately stated that the property contained 38.5 acres. In fact, the property located between Old Route 614 and State Route 614 is owned by Pharoh Roberts. The Buyers, relying on Survey 1, agreed to purchase the property from the Sellers.

The Sellers contacted a lawyer to prepare a deed to transfer the property. While the deed referenced and incorporated Survey 1, it also stated that the property was "estimated to contain 35 acres; however, this sale is being made by the boundary and not by the acre."

Subsequent to closing, it came to the Buyers' attention that Survey 1 incorrectly described the northern boundary. Ribble performed a second survey

("Survey 2") which correctly identified the northern boundary as Old Route 614 and stated that the property contained approximately 33.2 acres. Based on this information, the Buyers filed suit seeking to rescind the conveyance and recover the purchase price.

II

Summary judgment is appropriate when there is "no genuine issue of material fact" given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences are to be drawn in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

I will first address the merits of the summary judgment motions in regard to the Buyers' claim of fraudulent representation against both the Sellers and the Realtor. In finding that this claim has no merit, I will grant summary judgment in favor of both the Sellers and the Realtor.

Under Virginia law, to secure rescission of a conveyance based on fraudulent representations, the plaintiff must show by clear and convincing evidence that the defendant misrepresented or concealed a material fact and that the plaintiff relied on the misrepresentation or concealment. *See Masche v. Nichols*, 51 S.E.2d 144, 147 (Va. 1949). However, where the party to whom the misrepresentation was made makes a full and independent investigation and acts on the information so obtained, the party is barred from saying that he relied on the previous misrepresentation of fact. *See id.* at 148.

In this case, the Buyers hired a surveyor to determine the correct boundaries of the property. It is clear that when the Buyers purchased the property, they relied on the information obtained from the surveyor, and not on any information represented by the Sellers or the Realtor.[4] As the Buyers made a full and independent investigation of the property boundaries and relied on the information obtained in that investigation, they cannot now claim to have relied on misrepresentations, if any, made by the Sellers or the Realtor. Accordingly, both the Sellers and the Realtor's Motions for Summary Judgment in regard to the Buyers' claim for fraudulent representation will be granted.

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[4] The Buyers testified that they relied on the survey as representing the correct boundaries at closing, and not on any representations made by the Realtor or the Sellers. (K. Tackett Dep. at 62-63; J. Tackett Dep. at 44.)

III

I will next address the merits of the motions for summary judgment in regard to the Buyers' claim for mutual mistake of fact. For the reasons stated below, I will grant the Realtor's Motion for Summary Judgment and deny the Sellers' Motion for Summary Judgment in regard to this claim.

Under Virginia law, in determining whether a mutual mistake of material fact exists, the proper inquiry is whether each party held the same mistaken belief with respect to a material fact at the time the agreement was executed. *See Collins v. Dep't of Alcoholic Beverage Control*, 467 S.E.2d 279, 283 (Va. Ct. App. 1996). In order to qualify for rescission, the mistake must be "'common to both parties to a transaction, and may consist either in the expression of their agreement, or in some matter inducing or influencing the agreement, or in some matter to which the agreement is to be applied.'" *Seaboard Ice Co. v. Lee*, 99 S.E.2d 721, 727 (Va. 1957) (citations omitted).

The Buyers argue that all parties to the deed were under the mistaken belief that Survey 1 was correct. As the Realtor was not a party to the deed, the Buyers' claim against the Realtor for mutual mistake fails.

As to the Sellers, there remain unresolved issues of material fact as to whether there was a mutual mistake sufficient to justify rescission. It is unclear whether the

Sellers believed Survey 1 to be correct at the time of closing. They deny even reviewing it prior to closing. While the survey was referenced in the deed that they signed, the deed also recited an inconsistent fact—that the property conveyed was "estimated to contain 35 acres." Further, even if there was a mutual mistake, there is a dispute as to whether this mistake was material. While the Buyers assert that they would not have purchased the property had they understood the correct boundaries, I cannot find on this record that the incorrect location of the boundary line is a material mistake. As it stands now, there are genuine issues of material fact in dispute that must be decided by the trier of fact. Accordingly, in regard to the mutual mistake claim, both the Buyers' and the Sellers' Motions for Summary Judgment will be denied.

IV

For the reasons stated above, it is **ADJUDGED AND ORDERED** that:

1. The Motion for Summary Judgment by defendant Delores Crouse Real Estate, Inc. is granted and judgment is entered in favor of said defendant as to all claims asserted against it and it is dismissed from the action;

2. The Motion for Summary Judgment by defendants Judy Gay Ratliff, Wayne Ratliff, Brian Ratliff, Barry Ratliff, and Michael Ratliff is

granted in part and denied in part. Judgment is entered in favor of said defendants as to the claim of misrepresentation but denied as to the claim of mutual mistake of fact;

3. The Motion for Summary Judgment by the plaintiffs is denied; and

4. The case will be set for trial.

ENTER: February 27, 2003

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United States District Judge